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No.: 88-833

IN THE

Supreme Court of the United States

October Term, 1988

DOMINIC MARIANI,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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BRIEF FOR PETITIONER IN REPLY

INTRODUCTION

Dominic Mariani respectfully submits this brief in reply to the government's brief in opposition to his petition for a writ of certiorari.

ARGUMENT

The government erroneously contends that there is no significant split among the Circuit Courts on the issue of non-evidentiary uses of immunized testimony because "two of the four cases on which petitioner relies ... offer him no support at all." (Government brief at 7) The government is wrong. Notwithstanding the fact that convictions were affirmed, both *United States v. Crowson*, 828 F.2d 1427 (9th Cir. 1987), *cert. denied*, ___ U.S. ___, 109 S.Ct. 87 (1988), and *United States v. Byrd*, 765 F.2d

1524 (11th Cir. 1985), offer strong support for petitioner's claims.

In *United States v. Byrd, supra*, the Court rejected Mariani's position only to the extent that it rejected the defendant's claim that his immunized testimony had played a part in the prosecutor's motive for seeking an indictment against him. However, the Court also noted that *Kastigar v. United States*, 406 U.S. 441 (1972), bars the prosecution from "deriv[ing] some benefit in the preparation of the case by virtue of ... the immunized testimony." 765 F.2d at 1531-32.

Significantly, the government in *Byrd* took precisely the steps that should have been taken here. That is, a separate prosecutor was appointed to present the case against Byrd to a grand jury other than the one that had heard his immunized testimony. Hence, the defendant's complaint in *Byrd* was far more speculative: that the prosecutor who had questioned him in the grand jury participated in the decision to seek an indictment. Here, of course, the District Court found other uses of testimony from which the government derived "some benefit in the preparation of the case...." *Id.* Hence, application of *Byrd* to the facts of this case would require dismissal of the RICO indictment against Mariani.

Similarly, in *United States v. Crowson, supra*, the Court also agreed with our view of *Kastigar*, and rejected the defendant's immunity claim only because "the record is silent as to the prosecution's ... use of the immunized testimony for other non-evidentiary purposes such as planning cross-examination, interpreting evidence, and otherwise generally planning trial strategy." 828 F.2d at 1431. Here, in contrast, the record is not silent. Alan Friedman admitted that Mariani's immunized testimony caused him not to prepare for cross-examination. Similarly, the District Court found that the government made significant corroborative use of Mariani's testimony.

On these facts, the *Crowson* Court would have ruled in the defendant's favor. *See United States v. Carpenter*, 611 F.Supp. 768, 780 (N.D.Ga. 1985) ("Further, the government has not established that the information given by Carpenter under promises of immunity has not been used by the government to confirm the truthfulness of what was being told to them by cooperating witnesses."); *see also United States v. Tormos-Vega*, 656 F.Supp. 1525, 1531 (D.P.R. 1987).

Hence, contrary to the government's claims, there is a clear conflict between the Second Circuit and its sister Courts of Appeals. This being so, review of the issue by this Court would be appropriate

CONCLUSION

Petitioner's petition for a writ of certiorari should be granted.

Respectfully submitted,

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